

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2019-331-E - ORDER NO. 2020-342

JUNE 30, 2020

IN RE: Enrique McMilion, Jr.,	)	ORDER GRANTING
Complainant/Petitioner v. Duke Energy	)	MOTION TO DISMISS
Carolinas, LLC, Defendant/Respondent	)	

This matter comes before the Public Service Commission of South Carolina (“Commission”) on the motion of Duke Energy Carolinas, LLC (“DEC” or “Company”) to dismiss the above-captioned Complaint. For the reasons set out herein, the Commission dismisses the Complaint.

HISTORY OF THE DISPUTE

The docket currently before the Commission represents the third complaint filed by Enrique McMilion, Jr. (“McMilion”) concerning DEC’s attempts to install an AMI (Advanced Metering Infrastructure) meter, often called a “smart meter” at McMilion’s home in Anderson County, South Carolina. Since all three dockets are interrelated, a recap of all of them provides context for the Commission’s decision herein.

1. Docket No. 2018-379-E

McMilion filed his first complaint, docketed as Docket No. 2018-379-E, on December 3, 2018. In his complaint, McMilion alleged that smart meters violate the 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments to the U.S. Constitution, and that because smart meters can be used to collect electricity usage information, they violate South Carolina criminal statutes prohibiting eavesdropping, peeping, or voyeurism, as well as conspiracy to engage in

these activities. McMilion sought an order from the Commission requiring DEC to leave its legacy meter<sup>1</sup> in place rather than replacing it with a smart meter.

DEC moved to dismiss the complaint on January 10, 2019, offering in support of its motion that, while the Company had begun full deployment of AMI (“smart”) meters in 2016, it recognized that some customers objected to smart meters, and in response, it sought and obtained Commission approval of Rider MRM (Manually Read Meter), which allowed customers to opt out of smart meter installation in favor of a manually read meter at additional cost.<sup>2</sup> The Company represented to the Commission that it had informed McMilion on multiple occasions of the availability of the opt-out program, but that McMilion declined to enroll.

DEC further argued that McMilion’s constitutional arguments failed as a matter of law, since DEC is not a state actor, and therefore the 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments are not applicable to McMilion’s complaint. Finally, DEC pointed out that McMilion’s allegations based on criminal statutes are outside the jurisdiction of the Commission, and that the specific criminal statutes alleged to have been violated are inapplicable to the facts of this complaint.

On January 30, 2019, in an effort to ensure that McMilion had been afforded the fullest opportunity to state his case and to oppose the Motion to Dismiss, the Commission issued a Directive Order allowing him until February 15, 2019, to submit any additional filings and to oppose the Motion to Dismiss. The Commission further instructed the

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<sup>1</sup> In his complaint, McMilion refers to the meter presently installed at his home as an “analog” meter; DEC indicates that the meter is equipped with AMR (Automatic Meter Reading) capability.

<sup>2</sup> Customers opting for manually read meters under Rider MRM are charged a one-time set-up fee of \$150.00, divided into six equal installments, and a monthly meter reading fee of \$11.75.

Company to make any additional filings no later than March 1, 2019. McMilion did not file any additional materials. The Company filed additional testimony. Over four months passed, and on June 12, 2019, in Order No. 2019-427, the Commission dismissed Docket No. 2018-379-E because McMilion did not make any filing in opposition to the Motion to Dismiss.

2. Docket No. 2019-230-E

On June 17, 2019, five days after the Commission served its Order dismissing Docket No. 2018-379-E, McMilion filed another complaint against DEC, Docket No. 2019-230-E. On his initial complaint form, McMilion sought an order from the Commission barring DEC from installing any smart meter or digital meter until DEC fully disclosed the terms and conditions of service which authorize the utility to replace existing legacy meters with smart meters, and further requiring DEC to produce a writing, signed by McMilion, assenting to those terms and conditions. McMilion also requested that the full tariff be made available for public viewing pursuant to his interpretation of Commission Regulation 103-346, and that the Commission order DEC to perform only one reading of electric usage every 28 days pursuant to his interpretation of Commission Regulation 103-321.

In its Motion to Dismiss, filed on July 3, 2019, DEC provided hyperlinks to the applicable tariff and service regulations and explained that McMilion had ordered electric service by telephone, and that the service regulations were nonetheless effective in the same manner as if McMilion had executed a signed writing. Subsequently, in his filing of September 13, 2019, McMilion attempted to expand the scope of his complaint to

include the same allegations of unlawful surveillance and invasion of privacy he had made in Docket No. 2018-379-E. McMilion further complained of being forced to pay additional fees to opt out of installing a smart meter and instead installing a new manually read digital meter. McMilion would have DEC leave the electromechanical AMR meter in place at no additional cost.

In Order No. 2019-686, issued on September 25, 2019, the Commission dismissed McMilion's complaint in Docket No. 2019-230-E. The Commission rejected McMilion's claims that DEC is a state actor and that its smart meters engage in unlawful surveillance and violate customers' right to privacy, and further found McMilion's position that smart meters violate Commission Regulation 103-321 by continuously monitoring usage data to be untenable, as it would lead to the absurd result of banning all smart meters. The Commission concluded Order No. 2019-686 by reiterating that McMilion may still avail himself of Rider MRM to opt out of smart metering.

On September 26, 2019, McMilion sent an email to Chad Campbell of the Office of Regulatory Staff claiming that the Commission had dismissed his complaint in Docket No. 2019-230-E in error, and a copy of the email was transmitted to the Commission on September 30, 2019. The Commission treated the email as a motion for reconsideration, and in Order No. 2019-724, issued on October 9, 2019, the Commission denied McMilion's motion.

3. Docket No. 2019-331-E

On or about October 16, 2019, McMilion commenced Docket No. 2019-331-E, his third complaint against DEC regarding the same transaction or occurrence that was the subject of his two prior complaints. On October 17, 2019, McMilion requested that he be permitted an extension of 120 days in which to amend his complaint. The Company filed an Answer and Motion to Dismiss on or about November 14, 2019. On November 18, 2019, McMilion moved to strike DEC's Motion to Dismiss and renewed his request for a 120-day extension of time to amend his complaint. In Order No. 2019-822, issued on December 4, 2019, the Commission granted McMilion an extension of time to amend his complaint through January 8, 2020. McMilion's supplemental filing, received by the Commission on January 8, 2020, alleges that DEC has violated the covenant of good faith and fair dealing, the contracts clause of the U.S. Constitution, unconscionable conduct, and "tortious breach of contract" causing economic duress and mental anguish. McMilion requests that the Commission order the Company to honor its "original contract not in dispute," which he views as requiring a signed writing, and to cease and desist "illegal, unlawful, tortious, and bad faith actions." McMilion also requests that Commission Regulation 103-320 be abolished or amended to no longer allow the utility to choose its meters unilaterally.

DEC renewed its Motion to Dismiss on January 28, 2020. By letter on February 6, 2020, and by a follow-up email on February 11, 2020, McMilion requested an extension of four weeks to respond to DEC's Motion to Dismiss. On February 25, 2020,

the Commission issued Order No. 2020-142, granting McMilion until March 2, 2020, to make any additional filing in opposition to DEC’s Motion to Dismiss.

In his filing dated March 2, 2020, McMilion took issue with Commissioner Thomas J. Ervin’s characterization of his complaint during the Commission’s regular business meeting on February 19, 2020. He further interpreted Commissioner Ervin’s statement to the effect that the Commission “need[ed] to get this matter concluded” as an indicator of bias. Based upon this allegation of bias, McMilion demanded that all seven<sup>3</sup> Commissioners be recused from his case.

#### ANALYSIS OF DOCKET NO. 2019-331-E

##### A. Recusal

McMilion’s demand that the entire Commission be recused is based solely upon two statements by Commissioner Thomas J. Ervin during the Commission’s business meeting on February 19, 2020: first, that “Mr. McMilion asserts that his contractual relationship with Duke does not authorize the utility to install a smart meter on his home,” and second, that “[W]e need to get this matter concluded.” Neither of these statements provides a legal basis to require the recusal of Commissioner Ervin alone, and these statements certainly do not support recusal of all the Commissioners.

In *State v. Howard*, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009), the South Carolina Court of Appeals reiterated longstanding case law in upholding a trial judge’s denial of a motion to recuse, stating:

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<sup>3</sup> Currently, only six Commissioners are actively participating in Commission business. Vice Chairman Justin T. Williams is deployed abroad and is currently on military leave.

Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.

384 S.C. at 218, 682 S.E.2d at 45, *quoting*, *State v. Cheatham*, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002).

McMilion's unsupported assertions of bias in no way justify recusal of Commissioner Ervin, and they certainly do not justify recusal of the other Commissioners. Even if one infers from Commissioner Ervin's statement that the Commission should "get this matter concluded" that he believes the case is ripe for disposition without a hearing, that, without more, would not be indicative of bias warranting recusal. McMilion has presented no evidence of personal bias or animus on the part of Commissioner Ervin or any other Commissioner. Therefore, McMilion's Motion for Recusal is denied.

In addition to seeking recusal of all of the Commissioners without valid cause, McMilion's March 2, 2020, filing evinces his misperception that he is entitled to conduct discovery and present his case in a hearing in this matter, but that would be the case only if he had raised a material issue of fact which might entitle him to the relief he seeks. Absent any showing of a material issue of fact, his claims are subject to dismissal as a matter of law without discovery or a hearing.

**B. McMilion's Requested Relief**

McMilion has now filed three complaints since December 2018, with the second almost immediately following dismissal of the first, and the third almost immediately

following dismissal of the second. While each is articulated in a slightly different way, all three complaints essentially seek the same relief. McMilion does not want DEC to install a smart meter on his home, and he also does not want to pay the fees required under Rider MRM in order to opt for a manually read meter. He attempts to challenge DEC's unilateral right to choose the specific meters to be deployed in its service territory and impose upon the Company his own preference for an electromechanical analog meter at no additional cost. However, Commission Regulation 103-320 provides that meters shall be furnished by the utility. There is no provision in the applicable laws and regulations requiring utilities to use meters chosen by customers. He alleges that the manner by which DEC unilaterally chooses to change equipment infringes upon his right to contract. Duke's requirement that McMilion choose between permitting the Company to install a smart meter and paying the fees to install a manually read meter does not violate any contract or other rights. The terms and conditions under which a utility provides service are governed by its tariff and service regulations, not by contracts between the utility and individual customers. It has long been the law that service regulations and tariff provisions approved by the Public Service Commission have the force and effect of law and are binding on utility customers, regardless of whether an individual customer agreed to them. See, e.g., Carroway v. Carolina Power & Light Co., 226 S.C. 237, 84 S.E.2d 728 (1954).

DEC began deploying smart meters throughout its South Carolina service territory in 2016. In Docket No. 2016-354-E, DEC requested Commission approval of Rider MRM to give to its customers who did not want a smart meter the opportunity to choose



to have a manually read meter installed instead. Because the utility incurs the additional costs of having these meters read manually rather than receiving electric consumption data electronically, Rider MRM requires opt-out customers to pay a set-up fee of \$150 and a monthly charge of \$11.75. The Commission approved Rider MRM in Order No. 2016-791 on November 17, 2016. Rider MRM represents the only non-smart meter option for McMilion. We find that, as a matter of law, Rider MRM does not in any way violate McMilion's legal rights.

C. Res Judicata

The legal doctrine of *res judicata* bars subsequent litigation between identical parties where the claims arise out of the same transaction or occurrence that was the subject of the prior litigation between those same parties. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). This doctrine bars litigants from raising any issues which were adjudicated in the prior action as well as any issues which might have been raised in the prior action. *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina*, 294 S.C. 9, 362 S.E.2d 176 (1987).

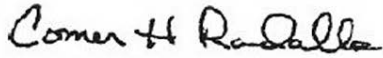
The complaint currently before us is the third complaint raised by the same individual, against the same utility, arising from the same transaction or occurrence. We have granted the Complainant multiple extensions of time, allowed him to make extra filings for our consideration, and extended other courtesies to him. Following dismissal of Docket No. 2018-379-E, we arguably could have found that Docket No. 2019-230-E was barred by *res judicata*, but we did not. Now, after having twice previously dismissed

complaints arising from the same transaction or occurrence, we adopt *res judicata* as an additional ground warranting dismissal of the complaint.

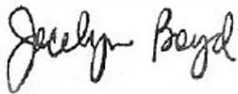
For all the reasons explained above, we find that Docket No. 2019-331-E should be, and hereby is, dismissed as a matter of law.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

  
Comer H. "Randy" Randall, Chairman

ATTEST:

  
Jocelyn Boyd, Chief Clerk/Executive Director